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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
AT TACOMA

10 HILDA L. SOLIS, Secretary of Labor, United
States Department of Labor,

11 Plaintiff,

12 v.

13 STATE OF WASHINGTON,
14 DEPARTMENT OF CORRECTIONS,

15 Defendant.

Case No. 08-5362RJB

ORDER GRANTING IN PART
AND DENYING IN PART
PLAINTIFF'S MOTION FOR
PARTIAL SUMMARY
JUDGMENT AND DENYING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

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17 This matter comes before the Court on Plaintiff's Motion for Partial Summary Judgment
18 (Dkt. 52), and Defendant's Motion for Summary Judgment (Dkt. 55). The Court has considered
19 the relevant documents and the remainder of the file herein.

20 **I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

21 On June 6, 2009, Plaintiff Secretary of Labor ("Secretary") filed a Complaint alleging that
22 the Defendant, Washington State Department of Corrections ("DOC"), violated the Fair Labor
23 Standards Act, 29 U.S.C. § 201 et seq. ("FLSA"). (Dkt. 1). The Secretary specifically alleged
24 that DOC violated the record keeping provision, 29 U.S.C. § 211, and the overtime provision, 29
25 U.S.C. § 207 of FLSA. The Plaintiff is seeking monetary relief for employees listed in an
26 attachment to the Complaint ("Exhibit A employees") under 29 U.S.C. § 216, and injunctive relief
27 under 29 U.S.C. § 217.
28

1 On July 21, 2009, Plaintiff moved for partial summary judgment on the issue of record
2 keeping, and the Defendant's affirmative defenses of waiver and laches. (Dkt. 52). On the same
3 day, Defendant moved for summary judgment on all claims. (Dkt. 55). The two motions will be
4 considered together by issue. The facts of the case are recited in the parties' pleadings and shall
5 not be repeated here, except through reference to the record.

6 II. DISCUSSION

7 Summary judgment is proper only if the pleadings, the discovery and disclosure materials
8 on file, and any affidavits show that there is no genuine issue as to any material fact and that the
9 movant is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). The moving party is
10 entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient
11 showing on an essential element of a claim in the case on which the nonmoving party has the
12 burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1985). There is no genuine issue
13 of fact for trial where the record, taken as a whole, could not lead a rational trier of fact to find
14 for the non moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586
15 (1986)(nonmoving party must present specific, significant probative evidence, not simply "some
16 metaphysical doubt."). *See also* Fed.R.Civ.P. 56(e). Conversely, a genuine dispute over a
17 material fact exists if there is sufficient evidence supporting the claimed factual dispute, requiring
18 a judge or jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby, Inc.*, 477
19 U.S. 242, 253 (1986); *T.W. Elec. Service Inc. v. Pacific Electrical Contractors Association*, 809
20 F.2d 626, 630 (9th Cir. 1987).

21 The determination of the existence of a material fact is often a close question. The court
22 must consider the substantive evidentiary burden that the nonmoving party must meet at trial –
23 e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477 U.S. at 254, *T.W. Elect.*
24 *Service Inc.*, 809 F.2d at 630. The court must resolve any factual issues of controversy in favor
25 of the nonmoving party only when the facts specifically attested by that party contradict facts
26 specifically attested by the moving party. The nonmoving party may not merely state that it will
27 discredit the moving party's evidence at trial, in the hopes that evidence can be developed at trial
28 to support the claim. *T.W. Elect. Service Inc.*, 809 F.2d at 630 (relying on *Anderson, supra*).

1 Conclusory, non specific statements in affidavits are not sufficient, and “missing facts” will not be
2 “presumed.” *Lujan v. National Wildlife Federation*, 497 U.S. 871, 888-89 (1990).

3 FLSA was enacted to protect all covered workers from substandard wages and oppressive
4 working hours. *Adair v. City of Kirkland*, 185 F.3d 1055, 1059 (9th Cir. 1999) (*citing*
5 *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 67 L.Ed.2d 641, 101 S.Ct. 1437
6 (1981)). FLSA applies to state and municipal employers. *Id.* FLSA is to be liberally construed
7 to apply to the furthest reaches consistent with Congressional direction. *Klem v. County of Santa*
8 *Clara*, 208 F.3d 1085, 1089 (9th Cir. 2000).

9 **A. FLSA Record Keeping**

10 Every employer subject to any provision of the FLSA “shall make, keep, and preserve
11 such records of the persons employed by him and of the wages, hours, and other conditions and
12 practices of employment maintained by him.” 29 U.S.C. § 211(c). “It shall be unlawful for any
13 person... to violate any of the provisions of [29 U.S.C. § 211].” 29 U.S.C. § 215(a)(5).

14 Employers must keep a record of hours worked each workday and total hours worked
15 each workweek for each employee. 29 C.F.R. § 516.2(a)(7). For employees working on fixed
16 schedules, an employer may maintain records showing the schedule of daily and weekly hours the
17 employee normally works instead of the hours worked each day and each workweek as required
18 by 29 C.F.R. § 516.2(a)(7). 29 C.F.R. § 516.2(c). In weeks in which more or less than the
19 scheduled hours are worked, the employer must show exact number of hours worked each day
20 and each week. 29 C.F.R. § 516.2(c)(2).

21 No particular order or form of records is prescribed by the regulations in this part. 29
22 C.F.R. § 516.1(a). However, every employer subject to any provisions of the Fair Labor
23 Standards Act of 1938 is required to maintain records containing the information and data
24 required by the specific sections of [part 516]. 29 C.F.R. § 516.1(a).

25 The Plaintiff moves for partial summary judgment on the issue of whether the Defendant
26 has violated the record keeping provision of FLSA. The Defendant also moves for summary
27 judgment on this issue. The separate motions will be addressed in order.

1 Plaintiff alleges that Defendant did not keep actual hours worked in accordance with the
2 record keeping provision of the FLSA. Dkt. 52 at 6. Plaintiff also alleges that “Defendant
3 attempted to avoid its responsibilities by assigning ‘fixed schedules’ to CCOs,” and that the “idea
4 of ‘fixed schedules’ for CCOs is a sham.” Dkt. 52 at 7. Plaintiff states that since this case does
5 not fall under the “fixed schedules exception,” the Defendant was required to keep track of actual
6 hours worked on a daily and weekly basis. *Id.* Plaintiff states that the CCOs’ daily hours would
7 vary from day to day, and that to accommodate the variations from the fixed schedules, the CCOs
8 were allowed to “flex” their schedule. Dkt. 52 at 2. It is alleged by Plaintiff that Defendant did
9 not keep any record of this flexing. Dkt. 52 at 3. Plaintiff argues that even though the Defendant
10 does maintain a record of the overtime hours, it does not maintain a record of “other hours”
11 worked during the overtime week. *Id.* Plaintiff further argues that even if the fixed schedule
12 exemption did apply, the Defendant failed to meet the requirements of that section by keeping
13 records of actual hours worked when the employee deviated from the fixed schedule. *Id.*

14 Defendant responds by asserting that it properly used the fixed schedule exemption and
15 that it did keep records in accordance with the law. Dkt. 66 at 3-4. Defendant states that the
16 employees were expected to work a fixed schedule and if employees did work more than 40 hours
17 per week, they were expected to report those exceptions on a form and submit it for approval.
18 Dkt. 66 at 4. Defendant states that employees that submitted a form were paid for all overtime
19 reported. Dkt. 66 at 4-5. Additionally, Defendant argues that the reporting requirement of actual
20 hours only pertains to situations where an employee works more or less than 40 hours in a week,
21 and that it does not apply to situations where employees work 40 hours in a week, despite
22 variations from the fixed schedule. Dkt. 66 at 4-5. Finally, Defendant responds by asserting that
23 any violation of the record keeping provision of FLSA is remedied by DOC’s new timekeeping
24 system, that was effective on November 28, 2007. Dkt. 66 at 12.

25 The Court believes that there are genuine issues of material fact. While there is evidence
26 that employees were required to submit forms in order to work overtime and that time was
27 recorded, it is uncertain whether *all* employees that “flexed” their schedule and worked overtime
28 had their hours recorded, whether it was actual hours or otherwise. The Plaintiff states that

1 “Defendant kept no records of such ‘flexing.’” Dkt. 52 at 3. While this may be true, it does not
2 say anything about whether the employees doing the flexing were actually performing overtime
3 work. The Defendant, in its response, only stated that employees were paid for all overtime
4 reported in accordance with DOC procedure. Dkt. 66 at 4-5. The Defendant does not address
5 those who did not report overtime according to DOC procedure. The central issue of how
6 employees that “flexed” their schedule and worked overtime were dealt with is unaddressed by
7 either party, and, therefore, it is inappropriate to grant summary judgment at this time.

8 This Court does not reach the issue of interpretation of the statute, as is urged by the
9 Defendant, since such analysis would be pointless without knowing how employees that “flexed”
10 their schedule without submitting an overtime form were dealt with. For the foregoing reasons,
11 the Plaintiff’s Motion for Partial Summary Judgment on the issue of Defendant’s violation of
12 record keeping should be denied.

13 The Defendant makes a substantially similar argument in its Motion for Summary
14 Judgment as in its response to the Plaintiff’s Motion for Partial Summary Judgment. Dkt. 55 at
15 14-15. The Plaintiff, in her response to Defendant’s Motion for Summary Judgment, make
16 arguments similar to her arguments on Plaintiff’s Motion for Partial Summary Judgment. Dkt. 68
17 at 7-8. Again the record is silent as to how the employees who flexed their schedule and worked
18 overtime were dealt with. The Defendant merely states that all approved overtime was recorded
19 and paid, and the Plaintiff asserts that DOC did not keep a record of actual hours worked each
20 day. *See* Dkt. 55 at 10, and Dkt. 68 at 8. Since the record is unclear, there is a genuine issue of
21 material fact as to whether there was a record of overtime hours for those who flexed their
22 schedule and worked overtime. For the foregoing reasons, the Defendant’s Motion for Summary
23 Judgment as to the issue of whether the DOC violated the record keeping provision of the FLSA
24 should be denied.

25 **B. FLSA Overtime Compensation**

26 “No employer shall employ any of his employees... for a workweek longer than forty
27 hours unless such employee receives compensation for his employment in excess of the hours
28 above specified at a rate not less than one and one-half times the regular rate at which he is

1 employed.” 29 U.S.C. § 207(a)(1). “It shall be unlawful for any person... to violate any of the
2 provisions of... [29 U.S.C. § 207].” 29 U.S.C. § 215(a)(2).

3 The Defendant, in its Motion for Summary Judgment, asserts that all Exhibit A employees
4 were paid for the hours they worked. Dkt. 55 at 15. The Defendant makes several arguments
5 supporting its assertion, including:

- 6 (1) The Secretary needs to provide specific evidence as to each individual that
worked additional hours.
- 7 (2) Even if the Secretary presents such evidence, it does not prove DOC’s liability
8 since it must still prove that the activities constitute “hours worked” under the
FLSA.
- 9 (3) The Secretary is only responsible for activities that benefit the employer and
the employer knew or should have known about them.
- 10 (4) Defendant states that the State and DOC prohibited unapproved overtime
work; that DOC paid for reported overtime work; and DOC went to lengths to
prevent overtime work.

11 Dkt. 55 at 16-17.

12 The Plaintiff responds by asserting that not all employees have been paid for all hours
13 worked. Dkt. 68 at 8. Plaintiff argues that while Defendant was able to find a few employees that
14 claimed they have not worked any uncompensated overtime, it does not establish that all
15 employees were compensated for overtime. *Id.* Plaintiff also addresses the Defendant’s
16 arguments regarding the definition of work and whether employer knowledge is required to create
17 liability. Dkt. 68 at 9-12.

18 Plaintiff presents sufficient evidence to create a genuine issue of material fact as to
19 whether employees worked overtime hours, and whether DOC knew of the overtime hours.
20 Plaintiff alleges that employees consistently worked more than 40 hours in a week. Dkt. 68 at 3.
21 Additionally, Plaintiff alleges that “Supervisors were aware fo the extra hours worked.” Dkt. 68
22 at 4. It would be inappropriate at this time to grant summary judgment as to the issues of
23 overtime compensation.

24 **C. Law Enforcement Exception**

25 FLSA creates an exception for law enforcement regarding overtime requirements. *See* 29
26 U.S.C. § 207(k). The law enforcement exception allows employers to calculate overtime using a
27 work period from seven days to 28 days, instead of a standard seven-day workweek. *Id.* The
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1 overtime threshold for a seven-day period is 43 hours, and the overtime threshold for a 28-day
2 period is 171 hours. *Id.* The law enforcement exception applies to employees who: (1) are
3 uniformed or plainclothed member of a body of officers and subordinates who are empowered by
4 State statute to enforce laws designed to maintain public peace and order and to protect both life
5 and property from accidental or willful injury, and to prevent and detect crimes, (2) have the
6 power to arrest, and (3) are trained in such areas including physical training, self-defense, firearm
7 proficiency, criminal and civil law principles, investigative and law enforcement techniques,
8 community relations, medical aid and ethics. *See* 29 C.F.R. § 553.211.

9 The Defendant, in its Motion for Summary Judgment, asserts that the FLSA law
10 enforcement exception should apply to CCOs and some CCSs based on their duties and
11 responsibilities. Dkt. 55 at 18-19. Defendant alleges that the CCOs have the power to monitor
12 and supervise court-ordered terms of offenders' community custody or supervision; they have the
13 authority to search; and they must maintain defensive-tactics qualifications and other training
14 requirements. Dkt. 55 at 19. Defendant also argues that a number of CCSs meet the
15 requirements under 29 C.F.R § 553.211. *Id.*

16 The Plaintiff responds by asserting that the FLSA law enforcement exception does not
17 apply in this situation because the Defendant has not met certain conditions for the exception to
18 apply. Dkt. 68 at 13. The Plaintiff states that a public agency does not violate the law
19 enforcement exception if the employee receives compensation at a rate not less than one and one-
20 half times the regular rate for hours worked over the average number in a work period of between
21 seven and 28 days. *Id.* Plaintiff alleges that Defendant did not pay CCOs in accordance with the
22 requirements of the exception, instead agreeing to pay CCOs in accordance with the Collective
23 Bargaining Agreement. *Id.*

24 It is uncertain, based on the allegations provided, whether the law enforcement exception
25 applies in this case. Since there is a genuine issue of material fact regarding whether the CCOs
26 and CCSs meet the definition of law enforcement employees and whether the law enforcement
27 exception applies, the Defendant's Motion for Summary Judgment should be denied.

1 **D. Representative Testimony - *Anderson v. Mt. Clemens Pottery Co.***

2 Where an employer's records are inaccurate or inadequate and the employee cannot offer
3 convincing substitutes, an employee must prove that the employee worked uncompensated hours
4 and present evidence as to the amount and extent of that work that is a "just and reasonable
5 inference." *Anderson, et al. v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687, 66 S.Ct. 1187, 90
6 L.Ed. 1515 (1946). The burden then shifts to the employer to come forward with evidence of the
7 precise amount of work performed or with evidence to "negative the reasonableness fo the
8 inference to be drawn from the employee's evidence." *Id.* at 687-88.

9 The Defendant in its Motion for Summary Judgment asserts that the Plaintiff may not use
10 *Anderson v. Mt. Clemens*, 328 U.S. 680 (1946), to justify Plaintiff's use of generalizations.
11 Defendant alleges that there are variations among Exhibit A employees which prevent any
12 generalization about work performed by non-testifying employees. Dkt. 55 at 21-24. Defendant
13 cites the declaration of Anne Fiala, Regional Administrator for the DOC, to support its
14 allegations. Dkt. 55 at 23-24. Defendant also asserts that the Secretary failed to obtain a
15 representative sample. Dkt. 55 at 24-26. Defendant states that DOC's experts have reviewed the
16 Secretary's investigation and concluded that it produced unreliable and misleading results. Dkt.
17 55 at 25. Finally, the Defendant alleges that the testimony of Exhibit A employees who stated
18 that they were fully paid demonstrates that no reasonable inference can be drawn as to the
19 experience of non-testifying employees. Dkt. 55 at 26.

20 The Plaintiff states that the "parties have not disclosed trial witnesses yet and thus it is not
21 possible to determine whether those witnesses will be sufficiently representative of those
22 employees who do not testify," and that there is a reasonable inference from the record that the
23 Defendant's records are incomplete. Dkt. 68 at 14-15. The Plaintiff also states that DOC's
24 argument that Plaintiff needs a scientifically valid sample has no support in case law or the
25 Secretary's policies. Dkt. 68 at 17.

26 The Plaintiff challenges Defendant's reasonable inference argument and accuracy of the
27 representative sample argument. The pleadings and the records indicate that there is a
28 disagreement as to the facts regarding the sample and the testimony by Exhibit A employees.

1 Therefore, summary judgment at this point would be inappropriate, and the Defendant's Motion
2 for Summary Judgment should be denied.

3 **E. Washington State Constitution**

4 The Defendant asserts in its Motion for Summary Judgment that any group inference
5 would be inconsistent with the Washington State Constitution. Dkt. 55 at 26. Article VIII,
6 section 5 of the Washington State Constitution states: "The credit of the state shall not, in any
7 manner be given or loaned to, or in aid of, any individual, association, [or] company." The
8 Washington Supreme Court laid out a two prong analysis in assessing whether an unconstitutional
9 gift of public funds has occurred: (1) if the funds are being expended to carry out a fundamental
10 purpose of government, and (2) if the expenditures do not fulfill a fundamental purpose of
11 government. *CLEAN v. State*, 130 Wash. 2d 782, 797-98, 928 P.2d 1054 (1996).

12 In *CLEAN*, the plaintiff filed a suit after the legislature had passed the bill and it was
13 signed by the governor. *CLEAN*, 130 Wash. 2d at 791. The act of passing and enacting the bill
14 created a damage which the plaintiff could act upon. In this case, however, there has been no
15 decision rendered in this case, and therefore, no damages. To even consider this issue, the Court
16 would have to assume that the Plaintiff will prevail in this case and that damages will be awarded
17 to employees for compensation for overtime, whomever they may be. It is too speculative at this
18 stage of litigation to contemplate the issue. This issue is premature and not ripe for decision on
19 summary judgment. Defendant's Motion for Summary Judgment on this issue should be denied.

20 **F. Minimum Wage Claim**

21 The Defendant asserts in its Motion for Summary Judgment that any claims or requests for
22 minimum wage violations should be summarily dismissed. Dkt. 55 at 17. The Plaintiff has not
23 alleged in the Complaint that the Defendant violated the minimum wage provision of the FLSA.
24 Dkt. 68 at 22. Therefore, the Defendant's Motion for Summary Judgment on this issue should be
25 granted.

26 **G. Injunctive Relief**

27 29 U.S.C § 217 states that the "district court... shall have jurisdiction, for cause shown, to
28 restrain violations of section 15 [29 U.S.C. § 215], including...the restraint of any withholding of

1 payment of minimum wages or overtime compensation found by the court to be due to employees
2 under [the FLSA].” The purpose of 29 U.S.C. § 217's injunction is to correct a continuing
3 offense against the public interest. *Paradise Valley Investigation & Patrol Serv., Inc. v. U.S.*
4 *District Court, District of Arizona*, 521 F.2d 1342, 1343 (9th Cir. 1975).

5 The Defendant asserts that there is no evidence that DOC engaged in the type of behavior
6 that suggests the need for injunctive relief. Dkt. 55 at 28. Defendant argues that DOC has
7 complied with the record keeping provision of FLSA, that DOC has demonstrated in the past
8 efforts to comply, that there is no danger of future violations because of DOC’s willingness to
9 comply with the law, and that parties seeking injunctive relief must come with clean hands. Dkt.
10 55 at 27-30. Plaintiff responds that this is the second investigation of DOC where violations of
11 the FLSA have been found, and therefore, injunction is appropriate. Dkt. 68 at 21.

12 The Court finds that there is a genuine issue of material fact on whether there may be a
13 future violation of FLSA by DOC because there is dispute on the past actions of DOC.
14 Therefore, the Defendant’s Motion for Summary Judgment on this issue should be denied.

15 **H. Waiver and Laches**

16 It is the duty of management to exercise its control and see that the work is not performed
17 if it does not want it to be performed. 29 C.F.R. § 785.13. It cannot sit back and accept benefits
18 without compensating for them. *Id.* The mere promulgation of a rule against such work is not
19 enough. *Id.* Management has the power to enforce the rule and must make every effort to do so.
20 *Id.* FLSA rights cannot be waived because this would nullify the purposes of the statute and
21 thwart the legislative policies it was designed to effectuate. *Barrentine v. Arkansas-Best Freight*
22 *Sys.*, 450 U.S. 728, 740, 101 S.Ct. 1437, 67 L.Ed.2d 641 (1981).

23 The Plaintiff asserts that to accept the Defendant’s argument that employees waive their
24 right to be properly compensated if they do not submit a request for approval of overtime prior to
25 working ignores the statutory requirements of FLSA. Dkt. 52 at 9. The Defendant responds that
26 there is a genuine issue of material fact whether the employees followed DOC policies and thus
27 whether DOC had actual or constructive knowledge of any alleged uncompensated overtime.
28 Dkt. 66 at 15.

1 While the Plaintiff does not cite 9th Circuit case law, the Court is persuaded by the
2 Plaintiff's argument. Additionally, the plain reading of the Department of Labor's regulation and
3 *Barrentine* support the Plaintiff's argument that defense of waiver is not allowed. For the
4 foregoing reasons, the Plaintiff's Motion for Partial Summary Judgment regarding Defendant's
5 affirmative defense of waiver should be granted.

6 The Plaintiff also asserts that summary judgment should be granted in regards to
7 Defendant's affirmative defense of laches. The Defendant responds that the Secretary should not
8 be able to claim a record keeping violation now after having known about the state's method and
9 having failed to pursue it. Dkt. 66 at 16. The doctrine of laches is inapplicable when Congress
10 has provided a statute of limitations to govern the action. *Miller v. Maxwell's International, Inc.*,
11 991 F.2d 583, 586 (9th Cir. 1993). 29 U.S.C. § 255 is the Statute of Limitations section of the
12 FLSA which governs "any cause of action for unpaid minimum wages, unpaid overtime
13 compensation, or liquidated damages." Since Congress has provided a statute of limitations to
14 govern this action, the defense of laches is inapplicable. Therefore, the Plaintiff's Motion for
15 Summary Judgment regarding Defendant's affirmative defense of laches should be granted.

16 **I. Motion to Strike**

17 In the Defendant's Reply in Support of Defendant's Motion for Summary Judgment and in
18 its Response to Plaintiff's Motion for Partial Summary Judgment, it moved to strike several items
19 of information submitted by Plaintiff. The Court did not rely on most of the items the Defendant
20 sought to strike in this order. However, the court did consider Roberta Sondgeroth's testimony,
21 which Defendant sought to strike. The Court is satisfied, at this point in litigation, that Ms.
22 Sondgeroth is competent to testify, that she had personal knowledge, and that the evidence
23 presented would be admissible at trial. Additionally, the Court was able to find adequate support
24 for the decisions in this Order from the record as a whole, and from the pleadings. The
25 Defendant's motions to strike should be denied for the aforementioned reasons.

1 **III. ORDER**

2 For the foregoing reasons, the Court does hereby find and ORDER:

3 (1) The Plaintiff's Motion for Partial Summary Judgment (Dkt. 52) is **GRANTED IN**
4 **PART AND DENIED IN PART** as follows;

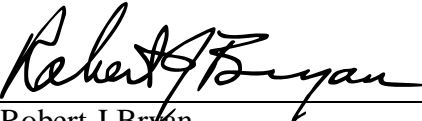
5 (a) There is a genuine issue of material fact regarding whether Defendant did or
6 did not violate the record keeping provisions set for in 29 U.S.C. § 211; therefore,
7 the Plaintiff's Motion for Partial Summary Judgment on this issue is **DENIED**;

8 (b) There is no genuine issue of material fact regarding Defendant's affirmative
9 defense of laches or Defendant's affirmative defense of waiver; therefore, the
10 Plaintiff's Motion for Partial Summary Judgment on these issues is **GRANTED**;

11 (2) The Defendant's Motion for Summary Judgment (Dkt. 55) is **DENIED**; and

12 (3) The Defendant's motions to strike in its Reply in Support of Defendant's Motion for
13 Summary Judgment (Dkt. 80) and in its Response to Plaintiff's Motion for Partial Summary
14 Judgment (Dkt. 66) is **DENIED**.

15 DATED this 31st day of August, 2009.

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17 Robert J Bryan
18 United States District Judge
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